No. 3824

In The

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CENTRAL CALIFORNIA CANNERIES CO., GRIFFIN & SKELLEY COMPANY, J. C. AINSLEY PACKING COMPANY, ANDERSON-BARNGROVER MANFG. CO., J. F. PYLE & SON, INC., HUNT BROTHERS COMPANY, SUNLIT FRUIT COMPANY,

Appellants,

v.

DUNKLEY COMPANY (now known as Michigan Canning & Machinery Company) and DUNKLEY COMPANY,

Appellees.

REPLY BRIEF FOR PLAINTIFFS-APPELLEES ON APPEAL AND MOTION TO DISMISS APPEAL.

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Appellant,
GRIFFIN & SKELLEY COMPANY,
Appellant,
J. C. AINSLEY PACKING COMPANY,
Appellant,
ANDERSON-BARNGROVER MANFG. CO.,
Appellant,
GOLDEN GATE PACKING COMPANY,
Appellant,
J. F. PYLE & SON, INC.,
Appellant,
HUNT BROTHERS COMPANY,
Appellant,
SUNLIT FRUIT COMPANY,
Appellant,

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REPLY BRIEF FOR PLAINTIFFS-APPELLEES ON APPEAL AND MOTION TO DISMISS APPEAL.

The statement of facts at page 5 of defendants-appellants' brief is incomplete because it omits any mention of defendants' petition to this court to vacate the de-

crees herein. The result of such motion was that this court refused to modify its mandate, and further made an order that the mandate when sent down should be without prejudice to the right of plaintiff to add the new Dunkley Company as party plaintiff.

At the time of making that motion the attention of this court was brought to the suit pending at Pasadena and to proofs therein. It is pointed out in the appellants' brief herein, at page 9, that this is the fact.

As this is the only matter from which appeal is allowed, and as we point out in our main brief this is not properly appealable matter, the appeal being an appeal from an *interlocutory* decree that does not have to do with the question of injunction, which had already been passed upon by this court as reported in 247 Fed. 790, it is very clear that this appeal should be dismissed.

The question of misjoinder of parties plaintiff, mentioned at page 14 of appellants' brief, is not an appealable matter; nor is the matter specified on page 16 an appealable matter, discussed under the heading "The order of the District Court was erroneous. It should have granted leave to the new Dunkley Company to file a supplemental pleading tendering proper issues calling for an answer by defendants. The effect of such a supplemental pleading would have been to *vacate* and set aside the interlocutory decree, the injunction and all proceedings since July 25, 1916."

It is clear that there was no such order made, the order being distinctly in accord with the new Equity rule 37, which among other things recites that

> "Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause."

The last clause of the rule recites:

> "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention,"

showing that the addition of a new party has nothing to do with the progress or of matters determined in the case. It is only necessary to show that the party is interested.

That the new Dunkley Company is interested appears here by showing of the defendants themselves. The matter, however, is not appealable, as only an appeal from a final decree is in order on such matters as are here in question. The case of *Kryptok v. Haussmann, 216 Fed. 267,* has nothing to do with the question of adding a party. It is a decision by Dickinson, district judge, for the eastern district of Pennsylvania. In that case the defendant's motion to dismiss was disallowed and permission was given to file a supplemental bill. Such a decision cannot possibly be material on the question of merely adding a party plaintiff.

In view of the fact that this matter is not appealable, we find that there is no occasion to consume the time of this court with a discussion of it.

This court has granted leave to the plaintiff to apply to the court for the inclusion of the added party. The court below has granted the petition, it being shown that there was really no change of party but a mere reor-

ganization. The objection urged by defendants is highly technical. It is, however, in no way timely, as no appeal should be allowed from such an interlocutory decree.

Hence the plaintiffs-appellees' motion to dismiss the appeal should be granted, for the reasons already stated in our main brief.

Respectfully submitted,

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